

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

EARLENE JOWERS,

Plaintiff,

v.

No.1:96CV347-S-D

TUPELO POLICE DEPARTMENT,

Defendant.

OPINION

This cause is before the court upon the defendant's motion for summary judgment on the plaintiff's claims of sex and age discrimination under Title VII and the Age Discrimination in Employment Act, respectively. Jowers, a 63-year-old female with the Tupelo Police Department, alleges that she was discriminated against when the defendant failed to promote her to the position of lieutenant.

FACTS

Earlene Jowers has been employed with the Tupelo Police Department since 1974. In 1991, Police Chief Billy White promoted Jowers to the position of master sergeant. On August 15, 1995, the promotion procedure which had been utilized since 1990 was changed. Immediately thereafter, three openings for lieutenant were posted--two for patrol lieutenants and one for warrants lieutenant. Jowers alleges that she applied for all three vacancies while the defendant maintains that

she only applied for the warrants lieutenant position. The patrol lieutenant vacancies were filled by two males, Jessie King, age 62, and Bobby Stubbs, in his mid-fifties, while the position of warrants lieutenant was filled by D.C. Washington, a male in his forties.

ANALYSIS

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). An issue is “genuine” when the nonmoving party comes forward with evidence sufficient to enable the trier of fact to find in his favor on the issue. *Id.* at 248. “This showing requires more than ‘some metaphysical doubt as to the material facts.’” *Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In this analysis, the court must view the facts and inferences from the evidence in the light most favorable to the nonmoving party. *Crescent Towing v. M/V Anax*, 40 F.3d 741, 743 (5th Cir. 1994).

In order to show that she suffered discrimination either as a result of age or sex, Jowers must prove that she is a member of the protected class, that she applied for the positions, that she was qualified for the positions, and that she suffered an adverse employment decision because of age or sex. *Brown v. CSI Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996). Jowers fails to prove her *prima facie*

case with regard to the two patrol lieutenant positions. A dispute exists between the two parties as to whether Jowers even applied for the position. The defendant presented documented evidence that the resumes for the patrol lieutenant positions were to be submitted by September 25, 1995, while the notice soliciting applications for the warrants lieutenant position was dated and posted on October 23, 1995. To refute this, the plaintiff offers only allegations that the process was delayed. Because the plaintiff has failed to offer more than allegations and assertions, her *prima facie* case collapses. In some circumstances the factual context may render the nonmoving party's claim implausible, and the nonmoving party must come forward with "more persuasive evidence" to support the claim "than would otherwise be necessary." *Matsushita*, 475 U.S. at 587.

Assuming, without deciding, that Jowers has established her *prima facie* case for both sex and age discrimination with regard to the position of warrants lieutenant, the factual inquiry proceeds to a new level of specificity. The parties agree as to the evidentiary framework of shifting burdens in employment discrimination cases. First, the plaintiff must establish a *prima facie* case of discrimination; second, if she is so successful, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant meets this burden, the inference of discrimination raised by the *prima facie* case disappears, and the plaintiff then must prove, by a preponderance of the evidence, both that the defendant's articulated reason is a pretext for discrimination and that the defendant intentionally discriminated. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-55 (1981).

As its legitimate nondiscriminatory reason, the defendant submits that D.C. Washington was the better candidate for the warrants lieutenant position. Rather than carry forward with her burden

of showing that the articulated reason was pretext, Jowers admits that Washington was the better qualified. From her brief, Jowers tells the court:

Jowers qualifications are not head and shoulders above D.C. Washington as they are the other applicants. The promotion of Washington over Jowers could possibly be defended if it stood alone. The history of White's discriminatory conduct, however, prevents this promotion from standing alone.

So while Jowers admits that she was not more qualified than Washington, she hopes to defeat summary judgment using a cumulative-evidence type standard without citing case law supporting this proposition.¹ Unfortunately for the plaintiff, this is not the law. The legitimate, nondiscriminatory reason articulated by the defendant is that Washington was more qualified. Thus, the plaintiff is duty-bound to proffer evidence that this reason is pretext for discrimination. The plaintiff concedes that the defendant's reason is legitimate, but then offers subjective-based allegations, none of which are substantiated by evidence, of Chief White's "discriminatory conduct" in general. Without more, the court must find for the defendant.

As a final matter, the court notes that the promotion of Jowers to master sergeant in 1991 by Chief White creates an inference that discrimination was not the motive behind his failure to promote Jowers in 1995. *Brown*, 82 F.3d at 658. An additional inference suggesting lack of age-base discrimination is the fact that all three positions were filled by members of Jowers protected class.² For the reasons stated above, the court finds there is no genuine issue of material fact

¹Jowers' allegations of discrimination include that the police department had never had a female lieutenant; that had Jowers been hired she would have been the oldest lieutenant promoted in 1995; that Chief White changed the promotional procedure as a means of ensuring that Jowers would not be promoted; and that Chief White did not want a 63-year old woman as a lieutenant. The plaintiff makes her allegations without submitting proof of the same.

²The Fifth Circuit does not recognize that replacement outside one's class is a necessary condition to the establishment of a prima facie case. *Nieto v. L & H Packing*, 108 F.3d 621, 624

and the defendant is entitled to judgment as a matter of law.

An appropriate order shall be issued.

This the ____ day of January, 1998.

CHIEF JUDGE

(5th Cir. 1997).